TSOI PING KWAN

v.

MEDAN JUTA SDN. BHD. & ORS.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' N.H. CHAN JCA
DATUK MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: B-02-850-95]
10 SEPTEMBER 1996

LAND LAW: *Sale of land - Caveats - Removal - Whether to be restored - Caveator a third party - Whether caveatable interest existed at time of entry - Purchaser acting on terms of Court order - Whether acting in good faith - Whether purchaser for value - Whether caveats to remain on register - Balance of convenience - Whether justice of case lay with purchaser - Whether caveator estopped by conduct from re-entering caveats.*

LAND LAW: *Sale of land - Caveats - Removal - Whether to be restored - Purchaser for value with notice of fact that nothing was to happen de futuro to take away the lands from it - Position of.*

CIVIL PROCEDURE: *Jurisdiction - Court of Appeal - Of making ancillary orders - Courts of Judicature Act 1964 s. 69(4) - Rules of the Court of Appeal 1994 r. 4 - Rules of the High Court 1980 O. 15 r. 6(2)(b) - Application by contingent creditor for payment of security deposit by respondent to meet his claim - Whether Court of Appeal seised with jurisdiction to make order.*

The appellant, a resident of Hong Kong, had advanced some HK$ 7 million to one Jessie Loh (Jessie), purportedly for the latter to invest the money on his behalf. Jessie, claiming that the money was given to her as a loan, used the same to purchase two parcels of land (the lands) for her company, Medan Juta Sdn. Bhd. (Medan Juta). Subsequently, by an agreement dated 17 June 1994, Medan Juta sold the lands to the second respondent (Ayer Hitam) for RM22 million. By the agreement, consideration for the purchase price was to be paid by the issue of shares in the second respondent.

Misunderstanding arose between the appellant and Jessie, whereupon the appellant, pleading resulting trust, lodged separate caveats on the lands to protect his alleged interest therein. On 4 September 1995, Medan Juta applied to remove the caveats, and following that the learned Judge ordered the caveats removed. According to the learned Judge, what transpired between the appellant and Jessie *vis-a-vis* the HK$ 7 million was a loan transaction and the appellant therefore had no caveatable interest to protect.

The appellant appealed and in the meantime applied for a stay order. The application for stay was heard on 23 January 1996 whereupon the trial Judge, endorsing an arrangement amicably reached by the parties to protect the appellant's interest pending his appeal, made an order to the effect that (i) the first respondent was at liberty to complete the sale of the lands to Ayer Hitam, but would issue a gurantee to the appellant in consideration thereof and (ii) there would be no order on the appellant's application for stay. Following the Court order, a guarantee was issued by Perdana Merchant Bankers Berhad in favour of the appellant, and which the appellant accepted. In essence, the guarantee stipulated that the appellant would be paid a sum not exceeding RM5 million in the event his appeal to the Court of Appeal succeeds and by then the sale of the lands to Ayer Hitam has been completed.

On 7 August 1996 the Court of Appeal heard the appellant's appeal, whereupon it restored the appellant's caveats ruling that the appellant had a caveatable interest at the time of lodging the caveats. However, by the time the ruling was made, the lands in question had been transferred to Ayer Hitam. In the circumstances, to determine, *inter alia*, the issue of where the justice of the case lay, the Court of Appeal ordered that Ayer Hitam be added as a second respondent to the appeal, and be given liberty to file an affidavit to support its case. The Court then proceeded to hear the parties wherefore the following primary questions arose for consideration:

(i) whether by accepting the guarantee and permitting the transfer to proceed, the appellant elected to pursue his claim in money rather than in the land.

(ii) if so, whether the appellant was estopped by his conduct from having the caveat re-entered against Ayer Hitam to whom the land had been transferred.

(iii) whether the caveats should continue to remain on the register.

The appellant *inter alia* argued that the balance of justice (as against Ayer Hitam) must lie in his favour as the latter was not a bonafide purchaser because it had not paid across the full purchase price when the appellant's caveat went on the register thereby ruling out any equity upon which Ayer Hitam could rely. This apart, the Court was also urged to make an order directing the first respondent to pay a sum of RM21 million, being the adjusted purchase price, into Court, as security to meet the appellant's claim in his suit againt the first respondent.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] As regards the balance of justice, the starting point *vis-a-vis* the position of Ayer Hitam must be the order of 23 January 1996 because that order was the basis for Ayer Hitam's decision to complete the purchase and to have the lands transferred unto itself.

[2] Having regard to the terms of the order of 23 January 1996, clearly, Ayer Hitam became a purchaser for value with notice of the fact that nothing was to happen *de futuro* to take away the lands from it. That order, which was not appealed against, was to the express effect that the sale to the second respondent could be completed. It follows that the lands could be transferred to Ayer Hitam to enable it to deal with them as it pleased.

[3] Ayer Hitam is entirely innocent and it would be wholly unjust and inequitable to permit the appellant to contend that the caveats should remain as against Ayer Hitam. Estoppel must apply as against the appellant, *vis-a-vis* its relationship with Ayer Hitam. The conduct of the appellant in all the circumstances of the case constitutes encouragement upon which Ayer Hitam acted. Suffice that it altered its position. There is no necessity that it did so to its detriment.

[4] By his conduct, the appellant was telling Ayer Hitam to go ahead and complete the sale and put itself on the register. Although the appellant was still going to pursue his claim, and to establish as against the first respondent that he had a caveatable interest in the lands, he had given up his right to re-enter his caveats and pursue a claim *in specie*. Since Ayer Hitam had acted upon the terms of the order of 23 January 1996, there was no question of it being guilty of any inequitable conduct.

[5] The balance of convenience thus favours Ayer Hitam. This Court therefore discharges its order of 7 August 1996 directing the re-entry of the caveats. This notwithstanding, the appeal as against the first respondent was allowed to the extent that the appellant had a caveatable interest in the lands in question.

[6] As to the question of whether any protection ought to be afforded to the appellant pending the trial of this action (against the first respondent), this Court is not seised of jurisdiction under s. 69(4) of the Courts of Judicature Act 1964 to make the kind of order asked for. Clearly, the power as conferred by s. 69(4) is only confined to making ancillary orders that would have the effect of completely giving the remedy which this Court intends to give when either allowing or dismissing an appeal. That aside, to grant the order asked for would also have the effect of pre-judging the merits

of the appellant's appeal against the refusal of a Mareva injunction. And lastly, to direct the provision of security in this appeal would raise the spectre of undue preference in the appellant's favour. The order sought for, hence, must be declined.

[Order accordingly. First respondent to bear costs of appeal]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG TANAH:** Penjualan tanah - Kaveat - Pembatalan - Samada harus dipulihkan kembali - Pengkaveat pihak ketiga - Samada kepentingan berkaveat wujud pada waktu kemasukan - Pembeli bertindak atas terma-terma perintah Mahkamah - Samada bertindak dengan niat baik - Samada pembeli bagi nilai - Samada kaveat harus kekal pada daftar - Imbangan keselesaan - Samada keadilan kes terletak pada pembeli - Samada pengkaveat diestop oleh perbuatan daripada memasukkan semula kaveat.*

***UNDANG-UNDANG TANAH:** Penjualan tanah - Kaveat - Pembatalan - Samada harus dipulihkan kembali - Pembeli bagi nilai dengan notis fakta bahawa tiada apa harus berlaku de futuro untuk mengambil tanah daripadanya - Kedudukan.*

***PROSEDUR SIVIL:** Bidangkuasa - Mahkamah Rayuan - Berhubung dengan membuat perintah sampingan - Akta Mahkamah Kehakiman 1964 s. 69(4) - Kaedah-kaedah Mahkamah Rayuan 1994 k. 4 - Kaedah-kaedah Mahkamah Tinggi 1980 A. 15 k. 6(2)(b) - Permohonan oleh pemiutang kontinjen bagi pembayaran deposit jaminan oleh responden untuk memenuhi tuntutannya - Samada Mahkamah Rayuan mempunyai bidangkuasa untuk membuat perintah.*

Perayu, seorang pemastautin Hong Kong, telah mendahulukan HK$7 juta kepada seorang Jessie Loh (Jessie). Mengikuti perayu wang tersebut adalah untuk dilabur oleh Jessie bagi pihak dirinya. Jessie, yang menuntut bahawa wang tersebut telah diberikan kepadanya sebagai pinjaman, telah menggunakannya untuk membeli dua bidang tanah (tanah-tanah tersebut) bagi syarikatnya, Medan Juta Sdn. Bhd. (Medan Juta). Berikutan itu, melalui satu perjanjian bertarikh 17 Jun 1994, Medan Juta telah menjual tanah-tanah tersebut kepada responden kedua (Ayer Hitam) dengan harga RM22 juta. Menurut perjanjian tersebut, balasan bagi harga belian itu akan dibayar melalui pengeluaran saham-saham dalam responden kedua.

Salah-faham telah berbangkit antara perayu dan Jessie, di mana perayu memplidkan amanah berbangkit, telah memasukkan kaveat ke atas tanah-tanah tersebut bagi melindungi kepentingannya dalam tanah-tanah itu. Pada 4 September 1995, Medan Juta telah memohon untuk membatalkan kaveat-kaveat itu, dan berikutan itu Hakim yang bijaksana telah memerintahkan supaya kaveat-

kaveat itu dibatalkan. Menurut Hakim yang bijaksana, apa yang berlaku antara perayu dan Jessie berhubung dengan HK$7 juta itu adalah suatu transaksi pinjaman dan perayu dengan itu tidak mempunyai kepentingan yang boleh dikaveatkan untuk dilindungi.

Perayu merayu dan sementara itu telah memohon untuk mendapatkan perintah penggantungan. Permohonan untuk penggantungan telah didengar pada 23 Januari 1996 di mana Hakim perbicaraan, sewaktu membenarkan satu persetujuan secara baik, yang telah dicapai oleh pihak-pihak terbabit untuk melindungi kepentingan perayu sementara menantikan rayuannya, telah membuat satu perintah yang mempunyai kesan bahawa (i) responden pertama adalah bebas untuk menyempurnakan penjualan tanah-tanah tersebut kepada Ayer Hitam, tetapi akan mengeluarkan satu gerenti kepada perayu sebagai balasan baginya dan (ii) tiada perintah diberi bagi permohonan perayu untuk perintah penggantungan. Berikutan perintah Mahkamah ini, satu gerenti telah dikeluarkan oleh Perdana Merchant Bankers Berhad atas nama perayu, yang mana telah diterima oleh perayu. Secara pentingnya, gerenti tersebut menyatakan bahawa perayu akan dibayar tidak melebihi RM5 juta sekiranya rayuannya kepada Mahkamah Rayuan berjaya dan pada ketika itu penjualan tanah-tanah kepada Ayer Hitam telah pun selesai.

Pada 7 Ogos 1996 Mahkamah Rayuan telah mendengar rayuan perayu, di mana ianya telah memulihkan semula kaveat-kaveat perayu setelah memutuskan bahawa perayu mempunyai kepentingan yang boleh dikaveat ketika menyerah-simpan kaveat-kaveat tersebut. Walaubagaimanapun, ketika keputusan ini dibuat, tanah-tanah tersebut telah pun dipindahmilik kepada Ayer Hitam. Dalam keadaan yang sedemikian, bagi menentukan, antara lainnya, isu di mana terletaknya keadilan kes, Mahkamah Rayuan telah memerintahkan supaya Ayer Hitam dimasukkan sebagai responden kedua kepada rayuan tersebut, dan diberikan kebenaran untuk memfailkan afidavit untuk menyokong kesnya. Mahkamah kemudian mendengar pihak-pihak tersebut di mana persoalan utama berikut telah berbangkit untuk pertimbangan:

(i) samada dengan menerima gerenti dan membenarkan pindahmilik itu diteruskan, perayu telah memilih untuk meneruskan tuntutannya dalam bentuk wang daripada dalam bentuk tanah tersebut.

(ii) jika sedemikian, samada perayu telah diestop oleh perbuatannya daripada memasukkan semula kaveat tersebut terhadap Ayer Hitam kepada siapa tanah tersebut telah dipindahkan.

(iii) samada kaveat-kaveat tersebut seharusnya kekal berada pada daftar.

Perayu antara lainnya telah berhujah bahawa imbangan keadilan (terhadap Ayer Hitam) mestilah terletak padanya kerana Ayer Hitam bukan merupakan pembeli *bona fide* kerana ianya masih belum menjelaskan harga belian yang sepenuhnya ketika kaveat perayu didaftarkan, yang dengan itu mengenepikan

apa-apa ekuiti di atas mana Ayer Hitam boleh bergantung. Selain itu, Mahkamah juga digesa membuat satu perintah mengarahkan responden pertama supaya membayar RM21 juta, yang merupakan harga belian yang telah diselaraskan, ke dalam Mahkamah, sebagai jaminan bagi memenuhi tuntutan perayu dalam guamannya terhadap responden pertama.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Berhubung imbangan keadilan, titik permulaannya berhubung dengan kedudukan Ayer Hitam ialah perintah bertarikh 23 Januari 1996 kerana perintah itu adalah asas bagi keputusan Ayer Hitam untuk menyelesaikan pembelian itu dan memindahmilik tanah-tanah tersebut kepada dirinya sendiri.

[2] Berhubung dengan terma-terma perintah bertarikh 23 Januari 1996, adalah jelas bahawa Ayer Hitam menjadi pembeli bagi nilai dengan notis bahawa tidak seharusnya berlaku apa-apa *de futuro* untuk mengambil tanah-tanah tersebut daripadanya. Perintah itu, yang mana tidak dirayui, mempunyai kesan nyata bahawa penjualan kepada responden kedua boleh diselesaikan. Ianya mengikut, bahawa tanah-tanah tersebut boleh dipindahkan kepada Ayer Hitam bagi membolehkannya untuk menguruskannya sepertimana yang disukai.

[3] Ayer Hitam sesungguhnya tidak bersalah dan ianya amat tidak adil dan tidak saksama untuk membenarkan perayu menegaskan bahawa kaveat-kaveat tersebut seharusnya kekal terhadap Ayer Hitam. Estopel mestilah terpakai terhadap perayu, berbanding dengan perhubungannya dengan Ayer Hitam. Perlakuan perayu, dalam halkeadaan kes, telah menjadi satu galakan terhadap mana Ayer Hitam telah bertindak. Adalah memadai bahawa Ayer Hitam telah mengubah kedudukannya. Tidak terdapat keperluan bahawa ia harus mengubah kedudukannya hingga memudaratkan dirinya sendiri.

[4] Melalui perlakuannya, perayu telah memberitahu Ayer Hitam untuk meneruskan dan menyelesaikan pembelian tersebut dan memasukkan dirinya dalam daftar. Walaupun perayu masih hendak meneruskan tuntutannya, dan membuktikan terhadap responden pertama bahawa beliau mempunyai kepentingan yang boleh dikaveatkan dalam tanah-tanah tersebut, beliau namun begitu telah melepaskan haknya untuk memasukkan semula kaveat-kaveatnya dan meneruskan satu tuntutan *in specie.* Oleh kerana Ayer Hitam telah bertindak atas terma-terma perintah bertarikh 23 Jnauari 1996, tidak terdapat persoalan bahawa ianya bersalah atas perbuatan yang tidak saksama.

[5] Imbangan keselesaan dengan itu memihak kepada Ayer Hitam. Mahkamah ini dengan itu melepaskan perintahnya bertarikh 7 Ogos 1996 mengarahkan kemasukan semula kaveat-kaveat tersebut. Walaupun begitu, rayuan terhadap responden pertama dibenarkan sehingga kepada had bahawa perayu mempunyai kepentingan yang boleh dikaveatkan dalam tanah-tanah yang dipersoalkan.

[6] Berhubung dengan soalan samada apa-apa perlindungan seharusnya diberikan kepada perayu sementara menantikan perbicaraan tindakan ini (terhadap responden pertama), Mahkamah ini tidak mempunyai bidangkuasa di bawah s. 69(4) Mahkamah Kehakiman Akta 1964 untuk membuat jenis perintah yang dipinta. Jelasnya, kuasa sepertimana yang diberikan oleh s. 69(4) adalah hanya terlingkung kepada membuat perintah-perintah sampingan yang akan mempunyai kesan memberikan keseluruhan remedi yang mana Mahkamah ini berniat untuk berikan ketika membenarkan atau menolak sesuatu rayuan. Selain itu, untuk memberikan perintah yang dipinta akan juga mempunyai kesan pra-pengadilan merit-merit rayuan perayu terhadap penolakan suatu injuksi Mareva. Dan akhirnya, bagi mengarah peruntukan jaminan dalam rayuan ini akan membangkitkan gambaran bahawa perayu telah diberikan keutamaan yang tidak wajar. Perintah yang dipohon, dengan itu, haruslah ditolak.

[Perintah sekadarnya. Responden pertama hendaklah menanggung kos rayuan]

Cases referred to:

Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng [1995] 2 CLJ 713; [1995] 2 AMR 969 ***(foll)***

Murugappa Chettiar v. Lee Teck Mook [1995] 2 CLJ 545; [1995] 1 MLJ 782 ***(foll)***

Hadmor Productions Ltd. v. Hamilton [1982] 2 WLR 322 ***(cit)***

Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(cit)***

Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin [1984] 1 MLJ 160 ***(cit)***

Meng Leong v. Jip Hong [1985] 1 MLJ 7 ***(cit)***

Tong Swee King v. Pegang Mining Co. Ltd. & Ors. [1967] 2 MLJ 214 ***(refd)***

Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 52 ***(refd)***

M & J Frozen Food Sdn. Bhd. & Anor. v. Siland Sdn. Bhd. & Anor. [1994] 1 MLJ 294

Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen [1995] 2 MLJ 770

Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd. [1995] 3 MLJ 331 ***(foll)***

Rama Chandran v. The Industrial Court of Malaysia ***(foll)***

Harris Solid State (M) Sdn. Bhd. & Ors. v. Bruno Gentil Pereira & Ors. ***(foll)***

Motor Sports International Ltd. v. Delcont (M) Sdn. Bhd. [1996] 2 AMR 2313 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(4)

Rules of the High Court 1980, O. 15 r. 6(2)(b)

a Rules of the Court of Appeal 1994, r. 4
Rules of the Federal Court 1995, r. 138
Rules of the Supreme Court 1980, r. 51(4)

For the appellant - Wong Chong Wah (Leong Wai Hong with him); M/s. Skrine & Co.

b *For the respondent - Cecil Abraham (Logan Sabapathy & R.S. Nathan with him); M/s. M. David Morais*

JUDGMENT

Gopal Sri Ram JCA:

c

This is an appeal against the decision of the High Court at Shah Alam. It is directed against the order of the Judge directing the removal of caveats which the appellant had entered against the register documents of title to lands belonging to the first respondent. Two titles are involved. The appellant had, on 2 May 1995, entered a caveat on each title. The learned Judge held that *d* the caveats could not be sustained because the appellant had no caveatable interest.

In order to understand the course which the appeal has taken before us, it is necessary to deal with some of the salient facts and the relevant chronology *e* of events.

The appellant is a resident of Hong Kong. He advanced various sums of money to one Jessie Loh, a director and shareholder of the first respondent which is a private limited company. In all, he gave her HK$7 million. There is no dispute about this. But there is a dispute about the purpose of the payment. *f* The appellant says it was for investment by Jessie Loh on his behalf. In other words, Jessie Loh is the trustee, and he the beneficiary, under a resulting trust of any property purchased with the moneys advanced. On the other hand, Jessie Loh says that it was a loan given to her and that she has repaid a substantial part of it. Her evidence is that she used the money to purchase *g* the lands in question in the name of the first respondent in which she, at all material times, held all shares but one. The lands were later charged to raise a loan for the first respondent.

On 17 June 1994, the first respondent entered into a sale and purchase agreement with the second respondent under which the lands in question were *h* sold to and purchased by the second respondent for a sum of RM25 million. The purchase price was to be settled by the issue of shares in the second respondent. Since the second respondent is a public limited company whose shares are listed and traded at the Kuala Lumpur Stock Exchange, the sale was subject to approvals being obtained from various regulatory bodies. One *i* such body is the Securities Commission which oversees the acquisition and disposal of assets of public listed companies. The Commission, having examined the proposed sale, reduced the purchase price to RM22 million. It also adjusted

the value which the parties had placed on the shares which formed the purchase consideration.

The sale and purchase agreement contained a clause which fixed the time within which the transaction was to be concluded. That time limit expired and the agreement lapsed on 15 May 1995 but was later extended by the parties thereto.

In the meantime there was an exchange of correspondence between the appellant and Jessie Loh. The letters are in Chinese. They are to be found in the record provided, together with translations in the English language. Among these is a letter dated 25 April 1995. It is from Jessie Loh to the appellant informing him that a half interest in the lands had been transferred to a third party whom she did not identify. There was a reply from the appellant. His letter is dated 1 May 1995. In it he questioned Jessie Loh about the transfer. He asked why he had not been told of it earlier. A day later, that is to say, on 2 May 1995, the appellant lodged his caveats. At that time, the second respondent had not entered a caveat to protect its position under the sale and purchase agreement. Why the second respondent's solicitors who had conduct of the conveyancing failed to take this rather elementary step to protect their client's interest remains a mystery.

In due course, the first respondent became aware of the caveats. By a letter dated 29 June 1995, it informed the second respondent of the appellant's caveats.

On 4 September 1995, the first respondent took out an originating summons seeking an order to remove the caveats. The learned Judge acceded to the application, and, as earlier observed, he directed that the caveats be removed.

In a carefully reasoned judgment, the learned Judge, after examining the affidavits before him, concluded that the transaction was a loan.

Having correctly directed himself on the law by reference to the judgments of this Court in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng* [1995] 2 CLJ 713; [1995] 2 AMR 969 and in *Murugappa Chettiar v. Lee Teck Mook* [1995] 2 CLJ 545; [1995] 1 MLJ 782, he said this (at pp. 32-33 of the appeal record):

> Pursuant to Form 19B Exh. P.2 in Encl. (2) i.e. his application for entry of a private caveat, the defendant was asserting the existence of a shareholding trust held by Jessie in his favour as beneficiary. The defendant was not claiming that the plaintiff as the registered proprietor was holding the said lands in trust for him as beneficiary. The dispute is in effect one between the defendant and Jessie as an individual in relation to the shares owned by Jessie in the plaintiff and not between the plaintiff and the defendant in relation to the said lands.

> On the facts as adumbrated above, I am of the view that the defendant should pursue his remedies against Jessie personally arising out of a creditor-debtor relationship. Repayments have been made by Jessie towards the various remittances made by the defendant and there was indeed still an outstanding balance which gives the defendant a cause of action against Jessie, but it seems to me that *vis-a-vis* the land, there is no evidence before me that the remittances made by the defendant have been used by the plaintiff either wholly, exclusively, substantially or partly for the purchase of the said lands. Hence, the defendant as caveator has not dischargad the onus of proving that he is beneficially entitled under any trust affecting the said lands or interest as contained in s. 323(1)(b). In the circumstances, I am of the view that the caveator has no caveatable interest and so the caveat must be removed. I therefore make an order in terms of this application.

At the hearing of this appeal on 6 August Mr. Wong Chong Wah carefully took us through the evidence in the record provided and demonstrated that the only evidence of the transaction being a loan and of substantial repayment comes from letters written by Jessie Loh to the appellant. Against this, there are letters written by the appellant to Jessie Loh which speak of an investment on his behalf. Mr. Wong also drew our attention to the evidence relating to the mode in which the alleged repayment was made. According to Jessie Loh, she made two payments of HK1 million each in cash Hong Kong. She has produced no document signed by the appellant acknowledging receipt of these sums. We are unable to see any difficulty in her getting an acknowledgment for these large sums of money, if indeed she had paid them across to the appellant.

Mr. Abraham of Counsel for the respondent made the following submissions in reply to those made by the appellant. First, he submitted that this is a case where the learned Judge had correctly applied the law in determining whether the appellant had a caveatable interest. Secondly, he argued that the learned Judge had carried out an evaluation of the evidence and arrived at the conclusion that the transaction was a loan and not a trust. Since the Judge had made no demonstrable error, this Court, whose initial jurisdiction in an appeal of this nature is one of review only (see, *Hadmor Productions Ltd. v. Hamilton* [1982] 2 WLR 322) ought not to interfere with the exercise of his discretion. See, *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212; *Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin* [1984] 1 MLJ 160.

At the conclusion of argument, we informed Counsel that we would reserve our decision to the following morning, but that in the meantime, they were at liberty to put in a written note on any further points they wished to raise but had overlooked during the course of oral submissions. Mr. Abraham then put in a note of submissions in which he drew our attention to the proceedings before the learned Judge on the appellant's application for a stay of the order directing the removal of the caveats.

The note recorded by the learned Judge shows that on the date on which the appellant's summons for a stay came on for hearing, Counsel on both sides had asked for an adjournment to make provision for the protection of the appellant's position pending the disposal of his appeal to this Court. The upshot was an order made by the learned Judge on 23 January 1996 in the following terms:

(1) the plaintiff [first respondent before us] be at liberty to complete its sale of the lands known as EMR No. 3116 Lot No. 1536 and C.T. No. 9098 Lot No. 1092 both in the Mukim of Cheras ("the said Lands") to Ayer Hitam Tin Dredging (M) Bhd. ("Ayer Hitam") [the second respondent in the appeal];

(2) that in the event the plaintiff's sale to Ayer Hitam is not completed, the plaintiff shall not sell the said Lands to others pending disposal of the defendant's appeal to the Court of Appeal;

(3) that the plaintiff do cause to be issued a guarantee to the defendant in terms of the draft annexed hereto and marked "App. 1"

(4) in exchange for the issuance of the said guarantee, there be no order made on the defendant's said application herein;

(5) nothing in the issuance and acceptance of the said guarantee is to be taken as an admission by the defendant that the defendant has consented to the sale of the said Lands to Ayer Hitam:

(6) that the parties be at liberty to apply.

It is common ground that the guarantee of which the order speaks was accepted by the appellant. The guarantee in question was issued by Perdana Merchant Bankers Bhd. It is dated 19 January 1996, is addressed to the appellant and is in the following terms:

Bank Guarantee

1. We have been approached by Medan Juta Sdn. Bhd. ('the Company') to provide to you a guarantee. In this respect, we are instructed that the genesis relating to this guarantee is as follows:

   a) the Company is the registered proprietor of the Lands held under EMR No. 3116 Lot No. 1536 and C.T. 9098 Lot No. 1092 both of Mukim of Cheras ('the said Lands') and that *vide* Presentation No. 1382/95 Jilid 108 Folio 53 and Presentation No. 12351/95 Jilid 27 Folio 60 ('the said Caveats'), you had caveated the said Lands;

   b) you had, on 2 August 1995, filed a suit in the Kuala Lumpur High Court *vide* Writ No. S2-22-302-95 ('the KL Suit') against the Company and one Jessie Loh Lai Ngoh ('Jessie Loh') for, *inter alia*, a declaration that you are beneficially entitled to the said Lands. An application has been filed by you to transfer the KL Suit to Shah Alam and this application is fixed for hearing in 9 February 1996;

c) upon an application of the Company *vide* Shah Alam High Court Originating Summons No. 24-830-95 ('O.S. No. 830'), the Shah Alam High Court on 15 December 1995 ordered the removal of the said Caveats ('the said Order'). In respect of the said Order, you have on 20 December 1995 through your solicitors, M/s. Skrine & Co. lodged an appeal to the Court of Appeal Malaysia against the said order ('the said Appeal');

d) pending disposal of the said Appeal, you have made an application to stay the enforcement of the said Order;

e) the Company intends to deal with the said Lands in favour of Air Hitam Tin Dredging Malaysia Bhd. ('Ayer Hitam').

2. **We Hereby Undertake And Guarantee** you as follows:

a) to pay on your written demand a sum not exceeding the sum of RM5,000,000 **Subject Always** to the following terms and conditions:

i) that the Company has completed the sale of the Lands to Ayer Hitam and that for the purposes of completion, the same shall be treated as having arisen upon the presentation of the relevant memorandums of transfers with the land office;

ii) that the said Appeal is allowed in your favour.

iii) that the obligation to pay such sum is determined and the amount of such sum quantified by the High Court in the KL Suit, or by the Shah Alam High Court to which the KL Suit has been transferred to, and/or the Court of Appeal and/or the Federal Court as the case may be, and judgment for such sum has been duly entered against the Company and/or Jessie Loh.

3. A sealed copy of the decision or judgment of 2(a)(ii) and (iii) above served on us together with your written demand shall constitute an effective determination of our liability under this guarantee.

4. Our said guarantee shall be irrevocable and continue in effect until the said Appeal is withdrawn by you or is dismissed by the Court of Appeal of Malaysia subject always that in the event we do not renew this guarantee upon the expiry and the events under clause 2 have not arisen, you shall be entitled within thirty (30) days from the said expiry to demand from us and we shall effect payment of a sum of RM5,000,000 to Messrs., Logan Sabapathy & Co., Advocates & Solicitors, Suite 2002, 20th Floor, Wisma Hamzah-Kwong Hing, No. 1 Leboh Ampang, 50100 Kuala Lumpur who shall hold the said sum as stakeholders to abide the events set out under clause 2 of this guarantee.

5. Subject to your rights under clause 4 hereof, this bank guarantee is valid for one (1) year from the date of issuance and expires on 19 January 1997 unless renewed on a yearly basis. Upon expiry, this guarantee is to be returned to us for cancellation. Notwithstanding whether you have returned

the same to us or not, our liability under the aforesaid guarantee shall subject to the said clause 4 be absolutely discharged thereafter.

Given under our hand on 19 January 1996.

Signed etc.

Having given the matters raised our due consideration, we formed the view that we required further assistance from Counsel upon the effect, if any, which the appellant's acceptance of the guarantee had on his appeal. Accordingly, when the appeal was called on for the pronouncement of our decision on the morning of 7 August 1996, we informed Counsel of the two related questions that had arisen overnight. They are as follows.

First, had the appellant, by accepting the guarantee and permitting the transfer to proceed, elected to pursue his claim in money rather than in the land?

Second, if the answer to the first question is in the affirmative, then, is the appellant estopped by his conduct from having the caveat re-entered against Ayer Hitam to whom the lands had, since the making of the order of 19 January been transferred?

Having formulated the issues upon which we required assistance, and having drawn the attention of Counsel to the decision of the Privy Council in *Meng Leong v. Jip Hong* [1985] 1 MLJ 7, we stood down further hearing of the appeal to noon on the same day. At the resumed hearing, we heard argument on the two questions raised. We must say at once that, for reasons that will become apparent, the appellant had satisfied us, at the conclusion of submissions on 6 August 1996, that he had a caveatable interest **as at the date of the entry of the caveats**. What we were concerned about was the appellant's conduct post-judgment giving rise to the two questions earlier formulated.

After having heard Mr. Wong Chong Wah on the appellant's behalf and Mr. Abraham on behalf of the first respondent, we were satisfied that as between the appellant and the first respondent the balance of justice certainly swung in the former's favour in having the caveat restored to the title. But that was not the end of the matter. The problem had been compounded by the transfer of the lands to Ayer Hitam. Any order that we were prepared to make at that stage would have most certainly resulted in serious prejudice to Ayer Hitam as the transferee. And it was not before us. We therefore considered it essential, as a matter of natural justice, that we should have evidence from Ayer Hitam and hear Counsel on its behalf before finally deciding where the justice of the case lay.

Therefore, in order to achieve the ends of justice, we made the following orders and gave the following directions:

(i) that the appeal be allowed to the limited extent that the caveats be restored to the register documents of title until further order of this Court;

(ii) that Ayer Hitam be added as a second respondent to the appeal;

(ii) that the title to this appeal be amended accordingly;

(iii) that the appellant do forthwith, that is to say, before the close of business on 7 August 1996, serve a copy of the record of appeal on solicitors for Ayer Hitam;

(iv) that Ayer Hitam as the added second respondent be at liberty to file an affidavit in support of its case;

This Court has ample jurisdiction under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 read with r. 4 of the Rules of the Court of Appeal 1994 to make these orders. See, *Tong Swee King v. Pegang Mining Co. Ltd. & Ors.* [1967] 2 MLJ 214, affirmed *sub nom. Pegang Mining Co. Ltd v. Choong Sam & Ors.* [1969] 2 MLJ 52.

The appeal was then adjourned to 16 August 1996 to hear arguments from the second respondent as to why the caveats should not continue to remain on the register of the lands of which it was now the registered proprietor.

When the appeal came on for continued hearing, we had an affidavit from the second respondent which the appellant had replied. In the light of the fresh material that was now before this Court, we invited, with the agreement of all Counsel, Mr. Wong Chong to argue the appeal against the second respondent.

Mr. Wong, with his usual candour, readily accepted that he had one of two choices to make at the hearing of his summons for a stay before the learned Judge. He could have either insisted on going forward with his application or he could have accepted the offer of a guarantee. Although he decided upon the latter course, the appellant was not estopped from having his caveats replaced on the register as against the second respondent.

Counsel went on to argue that the balance of convenience, or, more appropriately, the balance of justice, lay in favour of the appellant and against the second respondent. Relying upon the decision of the Supreme Court in *M & J Frozen Food Sdn. Bhd. & Anor. v. Siland Sdn. Bhd. & Anor.* [1994] 1 MLJ 294 and of this Court in *Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen* [1995] 2 MLJ 770, Mr. Wong submitted that the second respondent was not a *bona fide* purchaser because it had not paid across the full purchase price when the appellant's caveats went on the register. Once that proposition was accepted, then the second respondent cannot rely on any equity said to be arising in its favour.

So much for Mr. Wong's submissions.

When Raja Aziz rose to address us on behalf of the second respondent, we asked him to confine his reply only to two points. First, the matters that transpired before the learned Judge at the hearing of the appellant's summons for a stay, and in particular, the interpretation that was to be placed upon the appellant's acceptance of the guarantee. Second, whether the balance of justice ought to favour the appellant in the light of Mr. Wong's argument that the second respondent was not a *bona fide* purchaser.

Raja Aziz's response was as follows. As far as the balance of justice was concerned, the starting point *vis-a-vis* the second respondent must be the order of 23 January 1996. That order was the basis for his client's decision to complete the purchase and to have the lands transferred unto itself. It did not matter that prior to the making of the order the second respondent had notice or even knowledge of the appellant's caveats. Such prior notice or knowledge was overreached by the very terms of the order made on 23 January 1996. Having regard to the terms of that order, the second respondent became a purchaser for value with notice of the fact that nothing was to happen *de futuro* to take away the lands from it. That order, which was not the subject of any appeal, was to the express effect that the sale to the second respondent could be completed. It therefore followed as a consequence that the lands could be transferred to the second respondent to enable it to deal with them as it pleased. Further, the appellant was, by his conduct, telling the second respondent to go ahead and complete the sale and put itself on the register. The appellant cannot be now heard to say otherwise. The appellant was not giving up his right in relation to his appeal as against the first respondent for the purpose of establishing that he had a caveatable interest in the land. That was possibly to avert a claim for damages for wrongful entry of the caveats. Although he was also going to pursue his claim against the first respondent, he had given up his right to re-enter his caveats and pursue a claim *in specie*. Since the second respondent had acted upon the terms of the order of 23 January, there was no question of it being guilty of any inequitable conduct.

With these submissions, we agree. To accede to Mr. Wong's argument would be to set at naught the effect of the order of 23 January. The second respondent had, in good faith accepted the order. The conduct of the appellant in all the circumstances of the case constitutes encouragement upon which the second respondent acted. Suffice that it altered its position. There is no necessity that it did so to its detriment. See, *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 3 MLJ 331. In our judgment, it would be wholly unjust and inequitable to permit the appellant to contend that the caveats should remain as against the second respondent which, in the light of the circumstances adumbrated by Raja Aziz in the course of his address to us, is entirely innocent.

There are other reasons which tilt the balance in favour of the second respondent. It has entered into security arrangements with financial institutions to raise funds to develop the lands. It has effected sub-sales of subdivided plots to third party purchasers. If we were to direct a continuance of the order we made on 7 August, the consequences would prove injurious to the second respondent and other innocent persons.

Taking into account all the relevant circumstances of the case, we are of the view that the balance of convenience favours the second respondent. We therefore discharged our order of 7 August directing the re-entry of the caveat. However, for the reasons already given earlier in this judgment, the appeal as against the first respondent was allowed to the extent that the appellant had a caveatable interest in the lands in question.

There still remained the question as to whether any protection ought to be afforded to the appellant pending the trial of his action. During the discussion that followed between members of the Court and Counsel, we asked Mr. Abraham what had happened to the shares that had formed the consideration for the sale to the second respondent. He said that he was not immediately in a position to advise us on the matter. He said that if he was given sufficient time, he would get an officer of the first respondent to file an affidavit disclosing the answer to the question which we had raised. Mr. Wong saw no objection to this rather reasonable request.

In order to formalise Mr. Abraham's offer to put in evidence, we made an order directing Jessie Loh to swear and file an affidavit disclosing the whereabouts of the shares that formed the purchase consideration. We then reserved all orders, including the order we ought to make as to the costs of the proceedings before us to 24 August 1996. Well before that date, the first respondent put in an affidavit by Jessie Loh to which a response by the appellant was also delivered

When the matter came up before us once again on 24 August Mr. Wong asked us to make an order directing the first respondent to pay a sum of RM21 million, being the adjusted purchase price, into Court, as security to meet the appellant's claim in his suit against the first respondent. Mr. Abraham strongly urged us not to do anything of the sort. He argued that this Court was not seised of jurisdiction under s. 69(4) of the Courts of Judicature Act, 1964 ("the Act") to make the kind of order which Mr. Wong had asked for. That section reads as follows:

> 69(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

It was also submitted that the order proposed by the appellant would amount to an undue preference of the appellant as a contingent creditor. We were also advised at that stage of the argument that the appellant had unsuccessfully applied for a *Mareva* injunction before the High Court and that an appeal against its refusal was still pending before this Court. Mr. Abraham argued that if we were to make any kind of preservation order, it would seriously prejudice his client in the *Mareva* appeal.

We think that there is much force in the arguments advanced by Mr. Abraham.

In the first place, we agree with him that the power conferred by s. 69(4) of the Act is confined to making ancillary orders that would have the effect of completely giving the remedy which this Court intends to give when either allowing or dismissing an appeal. The decision of the Federal Court in *Rama Chandran v. The Industrial Court of Malaysia* (Supreme Court Civil Appeal No. 02-13-94, yet unreported) and of this Court in *Harris Solid State (M) Sdn. Bhd. & Ors. v. Bruno Gentil Pereira & Ors.* (Civil Appeal No. W-04-109-95, yet unreported) afford illustrations of the kind of orders that may be made in the exercise of the power conferred by the section.

In the former case, the Federal Court found the dismissal of the appellant workman to have been without just cause or excuse. It allowed the appeal and reversed the decision of the High Court refusing *certiorari*. Instead of remitting the case to the Industrial Court and thereby occasioning further delay, the Federal Court awarded compensation in lieu reinstatement. The Federal Court had undoubted power to make that order under r. 51(4) of the Rules of the Supreme Court, 1980 which was in terms identical to s. 69(4) of the Act, and which, despite its repeal, applied to the appeal in question by reason of r. 138 of the Rules of the Federal Court 1995.

In the *Harris* case, this Court having found the respondent workmen to have been victimised for their trade union activities, upheld the order of *certiorari* issued by the High Court and dismissed the employer's appeal. However, the order of the High Court was varied. The High Court's order remitting the case back to the Industrial Court was set aside and in its place an order of reinstatement was made.

Although *Rama Chandran* and *Harris* were both public law cases, they exemplify the type of orders that may be made under s. 69(4) of the Act when the Federal Court or this Court allows or dismisses an appeal.

Secondly, if we were to make an order directing the first respondent to provide security to meet the appellant's claim in the suit brought by him, it would most certainly have the effect of pre-judging the merits of his appeal against the refusal of a *Mareva* injunction. To do so, without having had the benefit of the reasons given by the learned Judge and having read the evidence adduced in support of and in opposition to that application, would occasion serious prejudice to the first respondent.

Lastly, we agree with Mr. Abraham that to direct the provision of security in this appeal would raise the spectre of undue preference in the appellant's favour. This Court has very recently held that such an order is not to be made even in *Mareva* proceedings. See, *Motor Sports International Ltd. v. Delcont (M) Sdn. Bhd.* [1996] 2 AMR 2313.

For these reasons, we declined to make the order sought by Mr. Wong.

As for costs, Mr. Abraham, with his customary frankness, conceded that this was entirely within our discretion. Taking into account all matters relevant to the exercise of our discretion, we considered that the fair and just order that ought to be made in the circumstances of this case was to direct the first respondent to bear all the costs of this appeal, including the costs of the second respondent. The order of costs made in favour of the first respondent by the High Court was set aside. The first respondent was ordered to pay to the appellant the costs of the proceedings in the Court below. The deposit paid into Court by the appellant was ordered to be refunded to him.

Before concluding, we must express our gratitude to all Counsel for the assistance they have rendered us in this rather difficult case.

Reported by W.A. Sharif